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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 ACADEMY OF OUR LADY OF  
11 PEACE,

Plaintiff,

12 vs.

13 CITY OF SAN DIEGO; CITY COUNCIL  
14 OF THE CITY OF SAN DIEGO; and  
DOES 1 through 100, inclusive,

Defendants.

CASE NO. 09cv962-WQH-AJB

ORDER

15 HAYES, Judge:

16 The matter before the Court is Plaintiff's Motion for Partial Summary Judgment and  
17 Plaintiff's Motion for Permanent Injunction. (Doc. # 17, 25).

18 **I. Background**

19 On May 5, 2009, Plaintiff Academy of Our Lady of Peace ("OLP") initiated this action  
20 by filing a Complaint in this Court against Defendant City Council of the City of San Diego  
21 ("City Council") and Defendant City of San Diego (collectively, "City"). (Doc. # 1). OLP is  
22 a nonprofit corporation which operates a Catholic, liberal arts, college-preparatory high school  
23 for young women. (*Id.* ¶ 3). The Complaint alleges that OLP's "existing campus facilities are  
24 woefully outdated and inadequate to meet OLP's mission" to educate and "inspire its students  
25 to grow as committed Christians." (*Id.* ¶¶ 12-13). OLP proposed a "Modernization Plan ...  
26 that would add two new facilities to the 84-year old campus: an approximately 20,545 square  
27 foot, two-story classroom building on the west side of the campus, and a two-level, 104-space  
28 parking structure on the east side of campus." (*Id.* ¶ 15). OLP's "Modernization Plan would

1 also require the demolition or removal of three single-family residences that OLP owns.” (*Id.*)  
2 In 2007, OLP applied to the City for an amendment to its existing “Conditional Use Permit”  
3 (“CUP”) and other use permits in order to implement OLP’s Modernization Plan. (*Id.* ¶ 16).  
4 On March 3, 2009, the City Council denied the use permits necessary to implement OLP’s  
5 Modernization Plan. (*Id.* ¶ 27). The Complaint alleges that “[t]he City’s action[s] in ...  
6 rejecting the Modernization Plan have effectively precluded OLP from meeting its classroom  
7 space and program needs at its current campus.... The City’s decision has imposed a  
8 substantial burden on OLP’s religious mission because it cannot provide the Catholic education  
9 it exists to provide.” (*Id.* ¶ 28).

10 The Complaint alleges thirteen causes of action related to the City’s March 3, 2009  
11 decision to deny the Use Permits. The first cause of action alleges a violation of the Religious  
12 Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. §2000cc, *et seq.*  
13 (*Id.* at 9). The next ten causes of action allege violations of OLP’s right to free exercise of  
14 religion, freedom of speech, freedom of association, equal protection and due process, as  
15 secured by the First and Fourteenth Amendments to the United States Constitution, and Article  
16 1, Sections 2-7 of the California Constitution. (*Id.* at 10-13). The first eleven causes of action  
17 seek compensatory damages, attorney fees and “an order declaring void the City’s decision to  
18 reject the Modernization Plan, and instead directing that [the] City issue Use Permits allowing  
19 the Modernization Plan.” (*Id.* at 16). The twelfth cause of action is a petition for writ of  
20 mandate pursuant to California Code of Civil Procedure § 1094.5, seeking an order directing  
21 the City to invalidate the March 3, 2009 City Council decision and issue the Use Permits  
22 necessary to implement the Modernization Plan. (*Id.* at 13-14). The thirteenth and final cause  
23 of action relates to the September 18, 2007 decision by an Administrative Law Judge  
24 employed by the City finding OLP in violation of the then-current CUP and ordering OLP to  
25 pay fines. (*Id.* at 14-16).

26 On May 26, 2009, Defendants filed a Motion to Dismiss the thirteenth cause of action  
27 of the Complaint. (Doc. # 6). On July 28, 2009, the Court granted the Motion to Dismiss and  
28 dismissed the thirteenth cause of action. (Doc. # 13).

1 On November 23, 2009, the Magistrate Judge conducted an Early Neutral Evaluation  
2 Conference. After the Conference, the Magistrate Judge issued an order which stated:

3 There are central legal issues which can be addressed early on by way of a  
4 motion for summary judgment. Plaintiff will be filing a motion for summary  
5 judgment on or before January 15, 2010. Defendant will be opposing and the  
6 Court sets a telephonic Case Management Conference for April 12, 2010 at 9:30  
7 a.m. to set further dates and deadlines as appropriate.... The record relative to  
the underlying dispute is complete and there is no need for disclosures under  
Rule 26 or formal discovery at this time. Should the Court find triable issues of  
fact do exist, any needed discovery can be dealt with after the dispositive  
motion.

8 (Doc. # 15 at 1).

9 On January 15, 2010, OLP filed the Motion for Partial Summary Judgment and the  
10 Motion for Permanent Injunction. (Doc. # 17, 25). OLP contends that it is entitled to  
11 judgment as a matter of law as to the Complaint's first cause of action that "the City violated  
12 ... RLUIPA ... when it rejected OLP's application for its 'Modernization Plan' ... in that the  
13 rejection imposed a substantial burden on the exercise of religion by OLP and its students and  
14 faculty." (Doc. # 17 at 1-2). According to OLP, "[i]f the Court grants summary judgment as  
15 requested, the [proposed permanent] injunction would command the City ... to approve the  
16 Modernization Plan in the form approved by the City's Planning Commission." (*Id.* at 2; *see*  
17 *also* Doc. # 25 at 1-2). OLP submitted numerous affidavits and exhibits in support of its  
18 motions. (Doc. # 17-26).

19 On February 17, 2010, the City filed an opposition to OLP's motions. (Doc. # 29). The  
20 City stated that "[d]ue to the limited nature of discovery and scope of this motion, Defendants  
21 rely exclusively on declarations and supporting documents submitted by Plaintiff." (*Id.* at 1).

22 On February 25, 2010, OLP filed a reply in support of its motions. (Doc. # 30).

23 On March 22, 2010, the Court conducted oral argument on OLP's pending motions.  
24 (Doc. # 31).

## 25 **II. Facts**

### 26 **A. OLP and Religion**

27 OLP is a Catholic high school for girls, the only single gender high school for girls in  
28 San Diego County. (Mahadevan Dec., ¶ 3, 2:23-24). OLP was founded in 1882 by the Sisters

1 of St. Joseph of Carondelet, an order of nuns dating back to France in 1650. (Anchondo Dec.,  
 2 ¶ 2, 2:3-8). OLP purchased its present location, in the North Park area of San Diego, in 1925  
 3 and moved its campus there in 1926. (Anchondo Dec., ¶ 2, 2:13-14, Ex. A:9-20). OLP's  
 4 facilities have been consecrated and have long been used, and continue to be used, for religious  
 5 services and activities. (Anchondo Dec., ¶ 2, 2:9-3:1, ¶ 4, 3:21-27). OLP's official Mission  
 6 is "twofold: to assist and enable parents to fulfill their role as the primary educators, and to  
 7 inspire its students to grow as committed Christians who are building Christ's kingdom of  
 8 justice, love and peace" through a college-preparatory program. (Anchondo Dec., ¶ 3, 3:4-10).  
 9 Crucifixes are present in every classroom. (Anchondo Dec., ¶ 5, 4:6). OLP requires students  
 10 to pass a religious studies class each year to graduate. (Anchondo Dec., ¶ 4, 3:12-14). Each  
 11 day begins with a prayer broadcast over the school's public address system, with additional  
 12 prayers offered throughout the day. (Anchondo Dec., ¶ 5, 4:4-10). OLP's individual  
 13 departments and classes are required to reflect OLP's religious purposes. (Anchondo Dec., ¶¶  
 14 5-6). The City Council has repeatedly recognized OLP's religious nature and praised its value.  
 15 (Mahadevan Dec., Ex. E:35-G:49).

#### 16 **B. OLP's Facilities**

17 OLP's Principal stated in a declaration:

18 OLP's facilities are inadequate, both in themselves and in comparison to  
 19 standards, to be able to provide this Catholic education. Meeting these standards  
 20 and having facilities comparable to other schools are important because about  
 21 98% of our graduates enroll in college.... I do not believe that OLP ... would be  
 22 able to survive at all if we could not offer a competitive college-preparatory  
 23 curriculum, for which we need the facilities in the Modernization Plan.

24 (Anchondo Dec., ¶ 7, 5:2-5; Ex. E:42).

25 OLP's Chief Financial Officer submitted a declaration outlining the following "specific  
 26 problems" with OLP's current facilities:

27 (a) Religion teachers must float between classrooms, rather than having a  
 28 dedicated religion classroom. (Mahadevan Dec., ¶ 9a, 5:3-6).

(b) There are fewer science labs than needed for OLP's students. (Mahadevan  
 Dec., ¶ 9b, 5:7-18).

(c) The existing computer room is inadequately small and contains  
 view-blocking pillars. (Mahadevan Dec., ¶ 9c, 5:19-23, Ex. D:32).

(d) OLP's arts studios are too small and subject to physical constraints such as structural pillars in the way. (Mahadevan Dec., ¶ 9d, 5:24–6:11, Ex. D:30, D:33).

(e) OLP's administrative offices are small and scattered from each other and the activities being supervised. (Mahadevan Dec., ¶ 9e, 6:12–17, Ex. D:31).

(f) OLP's library is smaller than OLP's students need. (Mahadevan Dec., ¶ 9f, 6:18–22).

OLP's Chief Financial Officer stated that the Modernization Plan would have solved these specific problems, and "would have provided an integral campus with all parking, classroom and administrative space within a securable perimeter while preserving the historical areas of the campus and meeting our religious and operational needs for the foreseeable future." (Mahadevan Dec., ¶ 9, 4:27–5:2).

OLP submitted declarations indicating that OLP's current campus is subject to unusual site constraints, including steep slopes, restricted fire access, and historic, architecturally-valuable buildings. (Lia Dec., ¶ 8, 6:9–22; Mahadevan Dec., ¶ 2, 2:9–11, 14–15; Marshall Dec., ¶ 6, 4:6–10; McArdle Dec., ¶ 3a, 2:23–27; 3c–3f, 3:9–4:7). An architect submitted a declaration indicating that "OLP asked [his firm] to evaluate the merits of potential adaptive reuse of several existing buildings on campus, to convert current spaces into classroom and support uses so as not to need something like the Modernization Plan." (McArdle Dec., ¶ 4, 4:8–10). The architect stated that OLP's existing buildings do not meet structural standards for the proposed reuse, such as for height of classrooms, load bearing ability, ventilation, and compliance with disabled access requirements, and upgrades would be extensive and expensive. (McArdle Dec., ¶ 4a–4e, 4:21–6:12).

### **C. City Planning Commission Decision**

OLP submitted its application for the Modernization Plan to the City in 2007. (Tunney Dec., ¶ 2–3, 2:5–22, Exs. A:8–F:45). The project went through extensive City review lasting over a year. (Tunney Dec., ¶ 4–6, 2:23–3:26, Exs. G:47–O:442). City staff determined that the Modernization Plan needed four use permits: a planned development permit for height, setback and use of tandem parking; a site development permit because part of the property contained steep slopes; an amendment to OLP's existing CUP to allow the school to have 750

1 students; and a neighborhood development permit, also for tandem parking. (Tunney Dec., ¶  
 2 6, 3:14-23, Ex. N:206-207). OLP made frequent efforts to engage the community about the  
 3 Modernization Plan. (Mahadevan Dec., ¶ 6, 3:15-24). OLP's architect stated that "OLP made  
 4 numerous changes to its [Modernization Plan] proposal to accommodate, as best we could,  
 5 neighbors' and City staff's concerns." (Mahadevan Dec., ¶ 8, 4:4-5).

6 In a report dated September 12, 2008, City staff recommended approval of the  
 7 Modernization Plan. (Mahadevan Dec., ¶ 9, 4:24-25; Tunney Dec., Ex. N:204). The City staff  
 8 report summarizes the Modernization Plan as follows:

9 The current campus facility includes eight structures and two surface parking  
 10 lots, in a primarily Mediterranean-style design. Three existing single-family  
 11 structures adjacent to the property have been purchased by AOLP over the years  
 12 and are proposed for demolition and incorporation into the modernized campus  
 13 with this permit.... The school has exceeded the allowed enrollment as specified  
 14 in [the CUP in effect at the time], which has resulted in the issuance of a Civil  
 15 Penalties Administrative Enforcement Order by the City.... In conjunction with  
 16 the terms of that order, the school is processing this permit request. The  
 17 proposed development is proposed to address the current and future operational  
 18 and academic needs of the school. ...

15 The proposed project is a request for a Planned Development Permit, Site  
 16 Development Permit, Conditional Use Permit and Neighborhood Development  
 17 Permit to allow: a maximum annual enrollment of 750 students; demolition of  
 18 three existing residential structures; construction of an approximately 21,059-  
 19 square-foot, two-story classroom building; and construction of a new, two-level  
 20 parking structure on the site. ...

18 The applicant has stated that their primary objective in proceeding with this  
 19 'master plan' project is to modernize the Academy of Our Lady of Peace school  
 20 and to allow the school to remain competitive in the current educational  
 21 environment in San Diego. Recently opened parochial high schools in the area  
 22 ... offer state of the art facilities, and the ability to attract new students to AOLP  
 23 has become a challenge.... Currently, classrooms at the school are tucked into  
 24 nooks, attics, closets, etc., in structures that were originally residences. While  
 25 several classroom buildings were added over the years and the conversion of a  
 26 former dormitory was accomplished, many current spaces used for classrooms  
 27 are of inadequate size for normal education classroom functions.

23 (Tunney Dec., Ex. N:205-206). The staff report contains a statement from the Chair of the  
 24 Urban Design/Project Review Subcommittee of the North Park Planning Committee, which  
 25 states that the Subcommittee "voted to deny the project and the CUP amendment by a vote of  
 26 6-3-0." (Tunney Dec., Ex. N:211). The staff report states that "[t]he project is the subject of  
 27 intense community interest." (*Id.*) The community concerns identified in the report involved  
 28 parking issues and the proposal to "demolish three existing residential structures; two of which

1 have been determined to be locally significant based on their architectural features. The  
2 applicant has considered adaptive reuse of these structures, but based on classroom size  
3 requirements and library facility requirements, has determined these are not viable options.  
4 Accordingly, this situation has resulted in significant unmitigated impact. The decisionmaker  
5 will be required to make a Statement of Overriding Considerations in order to grant this  
6 request.” (Tunney Dec., Ex. N:211-212).

7 OLP submitted memoranda and exhibits to the City Planning Commission stating  
8 OLP’s position that its current facilities were inadequate and that adaptive reuse of OLP’s  
9 existing facilities would not suffice. (Tunney Dec., Exs. O:395-414; P:444-447, 459-463,  
10 470-471, 483-485).

11 On October 9, 2008, the City’s Planning Commission voted 5-0 to approve the  
12 Modernization Plan with conditions. (Mahadevan Dec., ¶ 9, 4:24-25; Tunney Dec., ¶ 8, 4:6-7,  
13 Ex. S:542-554). A local ad hoc group, called “Between the Heights,” and the North Park  
14 Planning Committee, the City’s official community planning group for the area, appealed the  
15 Planning Commission’s decision to the City Council. (Mahadevan Dec., ¶ 9, 4:25-26; Tunney  
16 Dec., ¶ 8, 4:7-9).

17 The City Council continued its hearing once to get more information and allow OLP  
18 and the project’s opponents to attend mediation. (Tunney Dec., Ex. R:535; Williamson Dec.,  
19 Ex. A:8:13-16). The project’s opponents declined the mediation suggested by the  
20 councilmember even though OLP had offered to pay for it. (Williamson Dec., Ex. A:10:9-10,  
21 A:11:10-23, A26:5-10). The opponents’ representative explained that the community members  
22 “feel like they’ve been going through mediation for three years, and they’ve given everything  
23 they have to give. They’ve agreed to everything that [OLP] was requesting in terms of square  
24 footage, in terms of facilities. The only request that they have is that [OLP] preserve[s] the  
25 three homes....” (Williamson Dec., Ex. A:11:14-19).

#### 26 **D. City Council Decision**

27 During a meeting on March 3, 2009, the City Council voted on the permits necessary  
28 to implement OLP’s Modernization Plan. (Williamson Dec., Ex. A:41:8-12). During the



1 meeting, the following findings were made by Councilmember Todd Gloria:

2 Although the proposed project would implement objectives in the Greater North  
 3 Park Community Plan for providing high-quality educational facilities and  
 4 preserving open space and hillsides, the proposed project would eliminate two  
 5 historic buildings located in the immediate neighborhood, located at 2544  
 6 Collier Avenue and 2765 Copley Avenue. According to the project's  
 7 Environmental Impact Report, the proposal to remove the two architecturally  
 8 significant structures conflicts with the community plan's objective in the urban  
 9 design element for preserving the architectural variety and residential character  
 10 of the Greater North Park community and preserving and restoring unique or  
 11 historic structures within the community. The two structures have been  
 12 characterized and associated with the Spanish eclectic architectural style, and  
 13 their loss, as proposed by the project, would result in significant and unmitigable  
 14 impact as stated in the [Environmental Impact Report]. Therefore, the project's  
 15 proposal to remove the architecturally significant structures would adversely  
 16 impact the Greater North Park Community Plan's objectives for preserving  
 17 architectural variety and historic structures within the community, and this  
 18 finding cannot be made.

11 (Williamson Dec., Ex. A:19:1-25, A:20:1-13). Councilmember Gloria stated:

12 Based upon these findings and on the findings of the information  
 13 contained in the staff report, I move that the Planned Development Permit  
 14 Number 450668 and Site Development Permit Number 450706 be denied, and  
 15 Conditional Use Permit Number 450705 and the Neighborhood Development  
 16 Permit Number 590185 be granted in the form, exhibits, terms and conditions  
 17 as set forth in Permit Number 450705.

16 And based upon Staff's comments today, my motion does not include  
 17 adoption of the statement of overriding considerations. Additionally, my motion  
 18 includes two permit conditions that I'd like to add: First, that ... amendment to  
 19 the CUP [and] NDP is required prior to the issuance of demolition or relocation  
 20 permits for any building more than 45 years old located within the project  
 21 boundaries; and Second, that within 60 days of the approval of the permit,  
 22 Exhibit A shall be revised to reflect the City Council's actions including  
 23 identifying buildings which are to remain to the satisfaction of City Staff.

20 Even though it's my intention that the Site Development Permit and the  
 21 Project Development Permit be denied, I want to be clear that I feel a project  
 22 here is warranted, and I'm hopeful that OLP will bring forward a project that  
 23 will enable it to meet the programmatic needs of its students while preserving  
 24 the character of the surrounding community.

23 I'm confident that this can be done and that, when it is, I'm confident that  
 24 it will receive the support of the surrounding neighborhood and the Planning  
 25 Committee. I find -- I just think that's entirely doable, but I don't know that that  
 26 can be done today under these circumstances. With that, I restate my motion  
 27 that the Council modify the Planning Commission's decision by denying the  
 28 PDP and SDP but approving the CUP and NDP. This motion includes certifying  
 the [Environmental Impact Report] and adopting the [Mitigation Monitoring and  
 Reporting Program] for the no project/no development alternative with a  
 modification for the parking described in that alternative as detailed in the  
 revised permit and the [Mitigation Monitoring and Reporting Program] and that  
 this motion is based on the findings already read into the record.



(Williamson Dec., Ex. A:20:14-25, A:21:1-25, A:22:1-2). The reference to “a modification for the parking” is further explained in the relevant Mitigation Monitoring and Reporting Program report: “[T]he parking deficit of 47 spaces ... would be eliminated by provision of 104 parking spaces via a combination of restriping of the existing on-campus parking areas and designated off-site parking areas ... within 60 days [from] the March 3, 2009 City Council Hearing.” (Tunney Dec., Ex. T:580). The Mitigation Monitoring and Reporting Program report contains additional provisions mitigating “impacts associated with Transportation and Circulation.” (Tunney Dec., Ex. T:580; *see also id.* at T:600-602).

Councilmember Gloria’s motion was passed by the City Council by a vote of 5-3. (Williamson Dec., Ex. A:41:8-12).

In its written resolution memorializing the City Council decision, the City Council stated that “[t]he originally proposed project was a master plan to allow the school to address its operational and academic needs as a college preparatory school”; “[a] primary goal of the project is to ensure a safe, secure campus for the student population by providing additional on-site parking”; and “[t]he original proposed development plan would have improved the educational opportunities of residents attending the school and ensure the continuing viability of AOLP and continue the school’s contributions to the community.” (Tunney Dec., Ex. U:608-609, U:611). The City Council resolution also memorialized the findings made by Councilmember Gloria at the March 3, 2009 City Council meeting, quoted above, concluding that “the project’s proposal to remove the [two] architecturally significant structures would adversely impact the Greater North Park Community Plan’s objectives for preserving architectural variety and historic structures within the community....” (Tunney Dec., Ex. U:608, U:612-613).

#### **E. The Houses**

OLP owns the three houses at issue. (Mahadevan Dec., ¶ 2, 2:15-17). The City agreed that one of the three houses is not historically or architecturally significant. (Williamson Dec., Ex. A:19:8-12). The City viewed the two remaining houses as significant based upon their architectural style. (Tunney Dec., Ex. Q:499, Ex. N:209). According to the City’s study, there

are at least a dozen architecturally similar houses within a few blocks of the OLP-owned houses at issue. (Lia Dec., ¶ 3, 3:8–4:6, Exs. E:180–F:196). The historic regulations of the City, state and federal governments allow the removal (i.e., relocation) of architecturally significant structures. (Lia Dec., ¶ 5, 4:14–5:7, Ex. H:211-212). The City has authorized the relocation of at least nine historic structures since 1995, including two to sites out of the City. (Lia Dec., ¶ 6, 5:8-23). The City has authorized the demolition of at least five historic structures since 1995. (Lia Dec., ¶ 7, 5:24–6:8).

On September 6, 2007, OLP’s board of directors adopted a resolution pursuant to California Government Code § 37361 barring the City from designating the three houses as historic on the basis of OLP suffering a substantial hardship.<sup>1</sup> (Mahadevan Dec., ¶ 13, 7:24–8:2, Ex. C:23-24; Lia Dec., ¶ 4, 4:7-13, Ex. G:198-199). The City has not questioned the validity of this resolution. (Mahadevan Dec., ¶ 13, 8:2-3). The City staff report states: “The Board of Directors of [OLP] adopted a [resolution] of financial hardship pertaining to a religious exemption of [OLP] property from designation as a historical resource pursuant to Government Section 37361. Therefore, 2544 Collier Avenue and 2746 Copley Avenue properties are not, or would not be, listed in the City’s or other historical register; however, disclosure of the impacts is required under [the California Environmental Quality Act (“CEQA”).]” (Tunney Dec., Ex. N:209).

#### **F. Heritage Plan**

Some opponents of the Modernization Plan wanted OLP to hire David Marshall as an architect to propose a plan that would not require demolishing the houses. (Mahadevan Dec., ¶ 14, 8:4-6; Williamson Dec., Ex. A:30:19–31:12). During the pendency of this litigation, OLP hired Marshall and his firm (“Heritage”) to perform that study. (Mahadevan Dec., ¶ 14, 8:6-8; Marshall Dec., ¶ 5, 3:2-19). Heritage proposed a plan that did not require removal the

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<sup>1</sup> California Government Code § 37361 prohibits the involuntary historical designation of a “noncommercial property owned by any association ... that is religiously affiliated,” provided the association ... objects to the designation and “the association ... determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association ... of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.” Cal. Gov. Code § 37361(c).

three houses. (Mahadevan Dec., ¶ 14, 8:8-9; Marshall Dec., ¶ 6, 3:20-22, Ex. A).

OLP contends that the Heritage plan is infeasible for the following reasons:<sup>2</sup>

(a) The Heritage plan would require finding an alternative location, at great expense, for about half of OLP's classes for the year or two it would take to construct. (Mahadevan Dec., ¶ 14a, 8:11-20; Marshall Dec., ¶ 6a, 3:24-4:5).

(b) The Heritage plan increases the cost of the project by about eight million dollars, which OLP cannot foresee raising. (Mahadevan Dec., ¶ 14b, 8:21-22; Leverton Dec., ¶ 2, 2:10-12; Marshall Dec. Ex. A:76, 101). However, the cost of potential mitigation measures in the event the three houses are demolished has not been determined. (Marshall Dec., ¶ 6c, 4:13-14).

(c) The Heritage plan would divide the school's library into small spaces, impairing instructional value and necessitating the hiring of supervisory staff. (Mahadevan Dec., ¶ 14c, 8:23-26; Marshall Dec., ¶ 6e, 4:18-21).

(d) The Heritage plan would provide fewer parking spaces than the City had required. (Mahadevan Dec., ¶ 14d, 8:27-9:2; Marshall Dec., ¶ 6f, 4:22-26, Ex. A:58).

(e) The Heritage plan requires disruptive construction in the center of campus, while the Modernization Plan's construction was on the campus's periphery. (Mahadevan Dec., ¶ 14e, 9:3-5).

(f) The Heritage plan would require additional effort to provide an integral (i.e., secure) campus. (Marshall Dec., ¶ 6d, 4:15-17).

(g) Pursuing approval of the Heritage plan would require additional time and cost for City review and risk further litigation. (Mahadevan Dec., ¶ 14f-h, 9:6-13; Marshall Dec., ¶ 6a, 4:3-5).

(h) The Heritage plan raises its own issues about affecting potentially historic and architecturally valuable buildings. (Mahadevan Dec., ¶ 14i, 9:14-17; McArdle Dec., ¶ 4e, 6:9-12; Marshall Dec., Ex. A:57).

### III. Discussion

#### A. Standard of Review

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of

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<sup>2</sup> The City contends that it cannot respond to the facts related to the Heritage plan "until formal discovery has been completed." (Doc. 29-1 at 14-16).

1 the case. *See id.* at 248.

2 “When the party moving for summary judgment would bear the burden of proof at trial,  
3 it must come forward with evidence which would entitle it to a directed verdict if the evidence  
4 went uncontroverted at trial. In such a case, the moving party has the initial burden of  
5 establishing the absence of a genuine issue of fact on each issue material to its case.” *Miller*  
6 *v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006) (quotation omitted). “Once the  
7 moving party comes forward with sufficient evidence, the burden then moves to the opposing  
8 party, who must present significant probative evidence tending to support its claim or defense.”  
9 *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)  
10 (citation omitted).

11 In ruling on a motion for summary judgment, “all justifiable inferences are to be drawn  
12 in [the non-moving] party’s favor.” *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quotation  
13 omitted). At the summary judgment stage, “[c]redibility determinations, the weighing of the  
14 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those  
15 of a judge.” *Anderson*, 477 U.S. at 255.

16 “Simply because the facts are undisputed does not make summary judgment  
17 appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the  
18 undisputed facts, summary judgment is improper.” *Miller*, 454 F.3d at 988 (citation omitted).

#### 19 **B. Contentions of the Parties**

20 In the Motion for Summary Judgment, OLP contends that the City violated RLUIPA  
21 by denying OLP’s application for the permits needed to implement the Modernization Plan.  
22 OLP contends: “RLUIPA applies because the City’s actions affect commerce and because the  
23 City’s actions implemented local land use rules”; “OLP is attempting to exercise its and its  
24 students’ religious rights”; “the City imposed a substantial burden on these religious  
25 activities”; and “the City did not tailor its actions to a compelling interest.” (Doc. # 17-1 at 6,  
26 8, 12, 13). In the Motion for Permanent Injunction, OLP requests an injunction that “would  
27 command the City, including its agents, employees and those acting on its behalf or in concert  
28 with it, to approve without delay all discretionary permits necessary for OLP to proceed with

1 OLP's 'Modernization Plan' in the form approved by the City's Planning Commission." (Doc.  
 2 # 25 at 1-2). "OLP makes this motion [for permanent injunction] on the grounds that, upon  
 3 the Court's grant of partial summary judgment that the City violated ... RLUIPA ... by  
 4 imposing a substantial burden on the free exercise of religion when the City Council rejected  
 5 OLP's application for its 'Modernization Plan,' issuance of the requested injunction is  
 6 necessary to ensure compliance with RLUIPA." (Doc. # 25 at 2).

7 The City contends:

8 OLP's motion must be denied because Plaintiff has not shown the City's action,  
 9 which allows Plaintiff to retain its entire existing *and projected* student body  
 10 within the existing facilities successfully used to date by Plaintiff to  
 11 accommodate the same 750 students, constitutes a substantial burden on its  
 12 exercise of religion. This defect is further magnified by the fact that the City  
 13 neutrally applied historical preservation laws and because the parking  
 structure—covering two of the three controversial buildings—is not protected by  
 RLUIPA. Moreover, the City's obligation to abide by state historic preservation  
 guidelines under CEQA constitutes a compelling interest, and the City's  
 requirement that if feasible, Plaintiff allow the historic structures remain onsite,  
 constitutes the least restrictive alternative available to the City.

14 (Doc. # 29 at 3 (citations omitted)).

### 15 **C. RLUIPA**

16 RLUIPA establishes the following "general rule":

17 No government shall impose or implement a land use regulation in a manner that  
 18 imposes a substantial burden on the religious exercise of a person, including a  
 religious assembly or institution, unless the government demonstrates that  
 19 imposition of the burden on that person, assembly, or institution –

20 (A) is in furtherance of a compelling governmental interest; and

21 (B) is the least restrictive means of furthering that compelling  
 governmental interest.

22 42 U.S.C. § 2000cc(a)(1). This general rule "applies in any case in which":

23 (A) the substantial burden is imposed in a program or activity that receives  
 24 Federal financial assistance, even if the burden results from a rule of general  
 applicability;

25 (B) the substantial burden affects, or removal of that substantial burden would  
 26 affect, commerce with foreign nations, among the several States, or with Indian  
 tribes, even if the burden results from a rule of general applicability; or

27 (C) the substantial burden is imposed in the implementation of a land use  
 28 regulation or system of land use regulations, under which a government makes,  
 or has in place formal or informal procedures or practices that permit the  
 government to make, individualized assessments of the proposed uses for the

1 property involved.

2 42 U.S.C. § 2000cc(a)(2).

3 The plaintiff bears the burden of persuasion on whether RLUIPA's general rule applies,  
4 and whether the land use regulation at issue imposes a "substantial burden" on plaintiff's  
5 "religious exercise." 42 U.S.C. § 2000cc-2(b). If plaintiff successfully carries its burden, the  
6 government bears the burden of persuasion on whether the imposition of the "substantial  
7 burden" is in furtherance of a compelling governmental interest, and is the least restrictive  
8 means of furthering that compelling governmental interest. *See id.*; *see also* 42 U.S.C. §  
9 2000cc(a)(1).

### 10 **1. Applicability of RLUIPA**

11 OLP contends that RLUIPA applies because "the substantial burden affects ...  
12 commerce with foreign nations, among the several States." 42 U.S.C. § 2000cc(a)(2)(B). OLP  
13 has submitted evidence that OLP draws students from Mexico each year and has alumnae  
14 throughout the United States. (Mahadevan Dec., ¶ 3, 2:20-21, 2:24-28).

15 The City does not contest this evidence or OLP's contention that RLUIPA applies  
16 pursuant to 42 U.S.C. § 2000cc(a)(2)(B).

17 Accordingly, the Court concludes that RLUIPA applies in this case.

### 18 **2. Religious Exercise**

19 RLUIPA defines "religious exercise" as "any exercise of religion, whether or not  
20 compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The  
21 use, building, or conversion of real property for the purpose of religious exercise shall be  
22 considered to be religious exercise of the person or entity that uses or intends to use the  
23 property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

24 OLP has submitted evidence indicating that OLP's existing classrooms—and the  
25 construction of new classrooms—fit within RLUIPA's definition of "religious exercise."  
26 (Anchondo Dec., ¶¶ 3-6). The City does not contest that the Modernization Plan's proposed  
27 construction of a two-story classroom building fits within RLUIPA's definition of "religious  
28 exercise."



1 The Court concludes that OLP has demonstrated, as a matter of law, that the proposed  
 2 construction of a classroom building fits within RLUIPA's definition of "religious exercise."  
 3 *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)  
 4 ("Inasmuch as [the plaintiff] intends to convert the [p]roperty from hospital use to a place for  
 5 religious education, it appears that a 'religious exercise' is involved in this case.").

### 6 3. Substantial Burden

7 "[A] 'substantial burden' must place more than an inconvenience on religious exercise."  
 8 *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (quotation  
 9 omitted). "For a land use regulation to impose a 'substantial burden,' it must be 'oppressive'  
 10 to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must  
 11 impose a significantly great restriction or onus upon such exercise." *Id.* (quoting *San Jose*  
 12 *Christian College*, 360 F.3d at 1034). "[D]etermining whether a burden is substantial (and if  
 13 so whether it is nevertheless justifiable) is ordinarily an issue of fact ... and ... substantiality is  
 14 a relative term—whether a given burden is substantial depends on its magnitude in relation to  
 15 the needs and resources of the religious organization in question." *World Outreach*  
 16 *Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *cf. Shakur v. Schriro*,  
 17 514 F.3d 878, 891 (9th Cir. 2008) ("On this record, where there is factual dispute as to the  
 18 extent of the burden on Shakur's religious activities, the extent of the burden that would be  
 19 created by accommodating Shakur's request, and the existence of less restrictive alternatives,  
 20 we cannot conclude that summary judgment on the RLUIPA claim was appropriate.").

21 OLP contends that "[r]ejecting the Modernization Plan substantially burdened the  
 22 exercise of religion.... The Modernization Plan would have solved OLP's existing problems,  
 23 which include rooms that are cramped, undersized, and for some purposes simply absent;  
 24 spaces that contain pillars blocking students' views; and ... the absence of a secure perimeter."  
 25 (Doc. # 17-1 at 8-9). The City contends that "OLP's motion must be denied because Plaintiff  
 26 has not shown the City's action, which allows Plaintiff to retain its entire existing *and*  
 27 *projected* student body within the existing facilities successfully used to date by Plaintiff to  
 28 accommodate the same 750 students, constitutes a substantial burden on its exercise of

1 religion.” (Doc. # 29 at 3 (citations omitted)).

2 Viewing all reasonable inferences in the City’s favor, the Court concludes that OLP has  
 3 failed to show that it is entitled to judgment as a matter of law as to whether the City imposed  
 4 a substantial burden on OLP’s religious exercise. *See Miller*, 454 F.3d at 988 (“Simply  
 5 because the facts are undisputed does not make summary judgment appropriate. Instead,  
 6 where divergent ultimate inferences may reasonably be drawn from the undisputed facts,  
 7 summary judgment is improper.”) (citation omitted). OLP has submitted evidence from which  
 8 a reasonable jury could find that OLP’s facilities are “inadequate” (Doc. # 17-1 at 3) and  
 9 “cramped” (*id.* at 8). However, in light OLP’s successful operation of the school for many  
 10 years at or near its current and projected enrollment (Mahadevan Decl., Ex. F at 39, Doc. # 19),  
 11 a reasonable jury could find that the City’s actions did not “impose a significantly great  
 12 restriction or onus upon [OLP’s religious] exercise.” *Guru Nanak*, 456 F.3d at 988; *see*  
 13 *Hillcrest Christian Sch. v. City of Los Angeles*, No. 05cv8788, 2007 WL 4662042, at \*5-\*6  
 14 (C.D. Cal., July 12, 2007) (“In *Guru Nanak*, the substantial burden stemmed in part from the  
 15 fact that, absent a CUP, the [plaintiff] lacked a temple in which to hold services. For the  
 16 [plaintiff in *Guru Nanak*], the ultimate denial of a CUP placed its very existence in question.  
 17 Hillcrest does not face the same dire burdens of uncertainty. Hillcrest already operates a  
 18 school through which, by its own accounts, it prodigiously exercises its religious beliefs.”)  
 19 (finding, after a bench trial, that despite the claimed “onus of Hillcrest continuing to operat[e]  
 20 within ... an inadequate and cramped facility,” the city’s denial of permits necessary to build  
 21 a new campus for a religious school did not amount to a substantial burden under RLUIPA);  
 22 *see also Int’l Church of Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 941  
 23 (N.D. Cal. 2008) (granting the defendant city’s motion for summary judgment on a RLUIPA  
 24 claim despite the plaintiff’s argument that “the Church’s core functions are being inhibited by  
 25 the inadequate facility in which the City has forced it to remain”) (quotations omitted).

26 OLP has not submitted evidence that the burden is sufficiently substantial that the Court  
 27 would conclude that OLP is entitled to judgment as a matter of law. *Cf. Guru Nanak*, 456 F.3d  
 28 at 989 (affirming the grant of summary judgment for plaintiff, agreeing that the county


1 imposed a substantial burden “based on two considerations: (1) that the County’s broad  
 2 reasons given for its tandem denials could easily apply to all future applications by Guru  
 3 Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the  
 4 Planning Division, but the County, without explanation, found such cooperation insufficient”);  
 5 *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126, 1136 (S.D. Cal.  
 6 2008) (granting summary judgment in favor of plaintiff on its RLUIPA substantial burden  
 7 claim, stating: “At various levels of Defendants’ mandatory CUP process, Grace Church  
 8 experienced outright hostility to its application, decision-making that is seemingly arbitrary  
 9 or pretextual, and ignorance regarding the requirements of controlling federal law regarding  
 10 the application of land use laws to religious institutions.”); *Elsinore Christian Ctr. v. City of*  
 11 *Lake Elsinore*, 291 F. Supp. 2d 1083, 1090 (C.D. Cal. 2003) (granting summary judgment in  
 12 favor of plaintiff on a RLUIPA claim because “[t]he burden on the Church’s use of land in this  
 13 case is not only substantial, but entire. By denying the conditional use permit, the City has  
 14 effectively barred any use by the Church of the real property in question.”).

15 The Court concludes that OLP has failed to “come forward with evidence which would  
 16 entitle it to a directed verdict if the evidence went uncontroverted at trial” as to the issue of  
 17 whether the City imposed a substantial burden on OLP’s religious exercise. *Miller*, 454 F.3d  
 18 at 987. Accordingly, OLP’s pending motions are denied.

#### 19 **IV. Conclusion**

20 IT IS HEREBY ORDERED that Plaintiff’s Motion for Partial Summary Judgment is  
 21 **DENIED** (Doc. # 17), and Plaintiff’s Motion for Permanent Injunction is **DENIED** (Doc. #  
 22 25).

23 DATED: April 1, 2010

24   
 25 **WILLIAM Q. HAYES**  
 26 United States District Judge  
 27  
 28